

1988

Chris and Dick's Lumber and Hardware v. Tax Commission of the State of Utah : Unknown

Utah Supreme Court

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Attorney General of Utah.

R. La Mar Bishop; Attorney for Appellant.

Recommended Citation

Legal Brief, *Chris and Dick's Lumber and Hardware v. Tax Commission of the State of Utah*, No. 880188.00 (Utah Supreme Court, 1988).
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UTAH SUPREME COURT.

BRIEF

November 13, 1989

880188

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
330 State Capitol Building
Salt Lake City, UT 84114

HAND DELIVERED

RE: Chris and Dick's Lumber and Hardware v.
Tax Commission of the State of Utah
Case No. 880188

Dear Mr. Butler:

We wish to cite to the Utah Supreme Court the following statutes as additional authority in support of the arguments of the Tax Commission of the State of Utah ("Tax Commission") in Chris and Dick's Lumber and Hardware v. Tax Commission of the State of Utah that the statute in question was correctly interpreted by the Tax Commission and that the particular statute was not so vague as to be unconstitutional. See Br. of Resp. at 4-9. The statutes which we wish to cite to the Court, and to which we will refer during oral argument at 2:00 p.m. on Tuesday, November 14, 1989, are:

1. Utah Code Ann. § 59-10-26(1) and (2) (Supp. 1985).
2. Utah Code Ann. § 59-11-16 (Supp. 1985).
3. Utah Code Ann. § 59-12A-7 (Supp. 1985).
4. Utah Code Ann. § 59-13-27 (Supp. 1985).
5. Utah Code Ann. § 59-13-28 (Supp. 1986).
6. Utah Code Ann. § 59-14A-89 (Supp. 1986).
7. Utah Code Ann. § 59-15-8 (Supp. 1985).

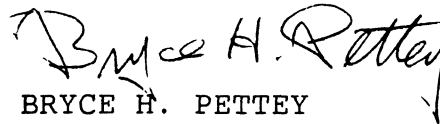
Geoffrey J. Butler
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8. Utah Code Ann. § 59-16-7.1 (Supp. 1985).
9. Utah Code Ann. § 59-16-7.1 (Supp. 1986).
10. Utah Code Ann. § 59-16-9 (Supp. 1985).
11. Utah Code Ann. § 59-16-9 (Supp. 1986).

This supplemental authority is submitted pursuant to R. Utah S. Ct. 24(j).

Because the cited statutes date back four (4) or five (5) years, and because the Utah Tax Code (Title 59, Utah Code Ann.) was revised and renumbered in the intervening years, copies of the cited statutes are attached for the convenience of the Court and counsel.

Sincerely,



BRYCE H. PETTEY
Assistant Attorney General
Tax & Business Regulation Div.

Att.

cc: R. La Mar Bishop, Esq.

1. Utah Code Ann. § 59-10-26(1) and (2) (Supp. 1985).

59-10-26. Date tax delinquent — Penalty — Interest — Installments.

(1) All taxes, unless otherwise specifically provided for under § 59-10-27, or other law, unpaid at noon on November 30 of each year following the date of levy, are delinquent, and the county treasurer shall close his office for the receipt of taxes until a delinquent list for publication has been prepared. If November 30 falls on a Sunday or other legal holiday, taxes become delinquent at noon on the day following the Sunday or legal holiday.

(2) All delinquent taxes shall be subject to a penalty of 2% of the amount of the taxes, but in no case shall that amount be less than \$10. Unless the delinquent taxes are paid as provided in § 59-10-29, the amount of taxes and penalty shall bear interest on a per annum basis from January 1 following the delinquency date. This interest rate shall be 6% above the "Federal Discount Rate" that exists on the 1st day of January following the date of delinquency. The rate shall be truncated to the whole percentage point.

2. Utah Code Ann. § 59-11-16 (Supp. 1985).

59-11-16. Rate of interest.

The rate of interest applicable to any tax provision administered directly by the state tax commission is 12% per annum through December 31, 1980. The interest rate in effect after December 31, 1980, shall be 12% per annum.

3. Utah Code Ann. § 59-12A-7 (Supp. 1985).

59-12A-7. Delinquencies — Interest — Penalty.

(1) Any tax due under this chapter which is not paid by the time prescribed for the filing of the return as provided in subsection 59-12A-5(1), not including any extensions in respect to the filing of the return or the payment of the tax, shall bear interest at the rate prescribed in section 59-11-16 until paid.

(2) If the return provided for in section 59-12A-5, is not filed within the time periods specified there, then the personal representative shall pay, in addition to the interest provided in subsection (1), a penalty equal to 5% of the tax due in respect to the transfer for each month beyond such time periods that the return has not been filed, but no penalty so imposed shall exceed a total of 25% of the tax.

4. Utah Code Ann. § 59-13-27 (Supp. 1985).

59-13-27. Failure to file return — Penalty.

In case of any failure to make and file a return required by this chapter within the time prescribed by law or prescribed by the tax commission in pursuance of law, there shall be added to the amount required to be shown as tax on the return 5% of the amount of the tax if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which such failure continues, not exceeding 25% in the aggregate, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect, no such addition shall be made to the tax. The amounts so added to any tax shall be collected at the same time and in the same manner and as a part of the tax, unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax.

5. Utah Code Ann. § 59-13-28 (Supp. 1986).

59-13-28. Deficiency — Interest.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the tax commission, and shall be collected as a part of the tax at the rate prescribed in § 59-11-16 from the date prescribed for the payment of the tax to the date the deficiency is assessed.

6. Utah Code Ann. § 59-14A-89 (Supp. 1986).

59-14A-89. Additions to tax and civil penalties.

(a) In case of failure to file an income tax return and pay the tax required under this act on or before the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return the greater of \$25 or five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. For the purposes of this subsection, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(b) If any part of any deficiency in tax imposed by this act, as defined by § 59-14A-69, is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, the greater of \$50 or five percent of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected and paid in the same manner as if it were a deficiency, except that the provisions of § 59-14A-87 relating to interest on deficiencies, shall not be applicable.

(c) If any part of a deficiency in tax imposed by this act, as defined by § 59-14A-69, is due to fraud, there shall be added to the tax an amount equal to the greater of \$100 or fifty percent of the deficiency. This amount shall be in lieu of any other addition to tax imposed by Subsection (a) or (b) of this section.

(d) If any employer, without intent to evade or defeat any tax imposed by this act or the payment thereof, shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of § 59-14A-40, such employer shall be liable for such tax and shall pay the same together with interest thereon and the addition to tax provided in Subsection (a) and such interest and addition to tax shall not be charged to or collected from the employee by the employer. The Tax Commission shall have the same rights and powers for the collection of such tax, interest, and addition to tax against such employer as are now prescribed by this act for the collection of tax against an individual taxpayer.

(e) Any person required to collect, truthfully account for, and pay over the tax imposed by this act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or default the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No addition to tax under Subsection (a) or (b) shall be imposed for any offense to which this subsection applies.

6. Utah Code Ann. § 59-14A-89 (Supp. 1986) (cont'd)

(f) In case of each failure to file a statement of a payment to another person, required under authority of § 59-14A-44 (relating to information at source, including the duplicate statement of tax withheld on wages), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall, upon notice and demand by the Tax Commission and in the same manner as tax, be paid by the person so failing to file the statement, a penalty of one dollar for each statement not so filed, but the total amount imposed on the delinquent person for all such failure during any calendar year shall not exceed \$1000.

(g) If any person who is required by regulations prescribed by the tax commission under this act —

(1) to include his identifying number in any return statement or other document;

(2) to furnish his identifying number to another person: or

(3) to include any return, statement, or other document made with respect to another person the identifying number of such other person, fails to comply with such requirement at the time prescribed by such regulations, such person shall pay a penalty of five dollars for each such failure, unless it is shown that such failure is due to reasonable cause; except that for failure to include his own identification number in any return, statement, or other document required to be filed by him, such penalty shall not be imposed unless such person shall fail to supply his identification number to the Tax Commission within thirty days after demand therefor.

(h) The additions to tax and penalties provided by this section shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes, and any reference in this act to income tax or tax imposed by this act, shall be deemed also to refer to the additions to tax and penalties provided by this section.

(i) For purposes of Subsections (b) and (c), the amount shown as the tax by the taxpayer upon his return shall be taken into account in determining the amount of the deficiency only if such return was filed on or before the last day prescribed for the filing of such return, determined with regard to any extension of time for such filing.

(j) For the purposes of Subsections (e) and (g), the term "person" includes an individual, corporation, or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

7. Utah Code Ann. § 59-15-8 (Supp. 1985).

59-15-8. Overpayments and deficiencies.

As soon as practicable after the return is filed, the tax commission shall examine it; if it then appears that the correct amount of tax to be remitted is greater or less than that shown on the return to be due, the tax shall be recomputed. If the amount paid exceeds that which is due, the excess, together with interest thereon at the rate prescribed in section 59-11-16 from the date of overpayment, shall be credited or refunded to the person paying it, upon written application; if it is determined that the overpayment was not made for the purpose of investment.

If the commission determines that any amount, penalty or interest has been paid more than once or has been erroneously or illegally collected or computed, the commission shall certify to the state auditor the amount collected in excess of what was legally due, from whom it was collected or by whom paid to the commission, and the amount of interest computed thereon, and if approved by the state auditor, it shall be credited on any amounts then due from that person to the state of Utah under this act or under any other taxing act, the administration of which is vested in the commission and the balance shall be refunded to that person or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed unless a claim is filed with the state tax commission within three years from date of overpayment.

In the event any amount has been illegally determined to be due from any person, the commission shall authorize the cancellation of the amounts upon its records.

If the amount paid is less than the amount due, interest at the rate prescribed in section 59-11-16 shall be added to the difference due computed from the time the return was due.

If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added the greater of \$50 or ten per cent of the total amount of the deficiency and interest at the rate prescribed in section 59-11-16 to the amount of the deficiency from the time the return was due.

If any part of the deficiency is due to fraud with the intent to evade, there shall be added the greater of \$100 or one hundred per cent of the total amount of the deficiency and interest at the rate prescribed in section 59-11-16 to the amount of the deficiency from the date the return was due.

The deficiencies in tax, together with penalties and interest imposed by this section, shall be due and payable by the taxpayer within ten days after notice and demand by the tax commission; except that when the commission determines that a greater amount was due than was shown on the return, and the tax is not deemed to be in jeopardy, the additional tax, penalty and interest shall be due and payable within thirty days after the commission mailed its report of deficiency determination.

7. Utah Code Ann. § 59-15-8 (Supp. 1985) (cont'd)

Except in the case where a deficiency is due to fraud with intent to evade tax or of a failure to file a return, the amount of taxes imposed by this chapter shall be assessed within three years after the return was filed and if not so assessed no proceeding for the collection of the taxes shall be begun after the expiration of the period.

In the case of a false or fraudulent return or payment with intent to evade tax or of failure to file a return, the tax may be assessed or a proceeding for the collection of the tax may be begun without assessment at any time.

Upon making a record of its reasons, the commission shall have the power, in its discretion, to waive, reduce or compromise any of the civil penalties or interest provided in this chapter.

8. Utah Code Ann. § 59-16-7.1 (Supp. 1985).

59-16-7.1. Prepayment of sales and use taxes — Return — Penalty. (1) Except as provided in Subsection (2) any person whose tax liability under Title 59, Chapters 15 and 16, and Title 11, Chapter 9, was (a) \$96,000 for the previous year, (b) \$24,000 for the previous quarter, or (c) whose estimated tax liability is \$8,000 or more per month, as determined by the State Tax Commission, shall prepay not less than 90% of the amount of the state and local tax liability for April and May of each year. The State Tax Commission shall establish by rule and regulation the procedures and guidelines in determining the tax liability under this section.

(2) The prepayment shall be accompanied by a return showing the amount of the prepayment in the form and manner determined by the State Tax Commission. The prepayments shall be made to the State Tax Commission on or before the 15th day of June each year, beginning June 15, 1984.

(3) The amount of the prepayment shall be a credit against the amount of the taxes due and payable for the quarterly period in which the payment became due. In addition to any other penalties for late payment provided in Section 59-15-5, there shall be a penalty of 10% of the total amount of the prepayment due, from the date the prepayment return is due.

9. Utah Code Ann. § 59-16-7.1 (Supp. 1986).

59-16-7.1. Prepayment of sales and use taxes — Return — Penalty.

(1) Except as provided in Subsection 59-16-7(2) any person whose tax liability under Title 59, Chapters 15 and 16, and Title 11, Chapter 9, was (a) \$96,000 for the previous year, (b) \$24,000 for the previous quarter, or (c) whose estimated tax liability is \$8,000 or more per month, as determined by the State Tax Commission, shall prepay not less than 90% of the amount of the state and local tax liability for April and May of each year. The State Tax Commission shall establish by rule the procedures and guidelines in determining the tax liability under this section.

(2) The prepayment shall be accompanied by a return showing the amount of the prepayment in the form and manner determined by the State Tax Commission. The prepayments shall be made to the State Tax Commission on or before the 15th day of June each year, beginning June 15, 1984.

(3) The amount of the prepayment shall be a credit against the amount of the taxes due and payable for the quarterly period in which the payment became due. In addition to any other penalties for late payment there shall be a penalty of 10% of the total amount of the prepayment due.

10. Utah Code Ann. § 59-16-9 (Supp. 1985).

59-16-9. Deficiencies — Penalty. If the commission, at any time within three years after any return is filed, except in cases of intent to defraud, is not satisfied with the return and payment of the amount of tax herein required to be paid to the state by any person, it may examine the return and recompute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this section shall bear interest at the rate prescribed in section 59-11-16 from the time the return was due. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, but without intent to defraud, a penalty of ten per cent of such amount shall be added, plus interest at the rate prescribed in section 59-11-16 from the time the return was due. If any person not holding a sales tax license under the provisions of section 59-15-3 or a valid use tax registration certificate shall make a purchase of tangible personal property for storage, use, or other consumption in this state and fail to file a return or pay the tax due within 170 days from the time the return is due, this person shall pay a 25% penalty plus interest at the rate prescribed in section 59-11-16 and all other penalties and interest as provided by this title. If any part of the deficiency for which a determination of an additional amount is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of one hundred per cent of such amount shall be added, plus interest at the rate of one per cent per month or at the rate prescribed in section 59-11-16 if it is higher than 12% per annum from the time the return was due. The commission shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination by mail postpaid and the deficiency, plus penalties and interest, is due and payable ten days after notice and demand; except that when the commission finds a greater tax is due than was shown on the return, and the tax is not deemed to be in jeopardy, the additional tax, penalty and interest is due and payable within thirty days after the commission mails the report of deficiency determination. Upon making a record of its reasons, the commission shall have the power, in its discretion, to compromise any of the civil penalties or interest provided in this

11. Utah Code Ann. § 59-16-9 (Supp. 1986).

59-16-9. Deficiencies — Penalty.

If the commission, at any time within three years after any return is filed, except in cases of intent to defraud, is not satisfied with the return and payment of the amount of tax herein required to be paid to the state by any person, it may examine the return and recompute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this section shall bear interest at the rate prescribed in § 59-11-16 from the time the return was due. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, but without intent to defraud, a penalty of the greater of ten percent of such amount or \$50 shall be added, plus interest at the rate prescribed in § 59-11-16 from the time the return was due. If any person not holding a sales tax license under the provisions of § 59-15-3 or a valid use tax registration certificate shall make a purchase of tangible personal property for storage, use, or other consumption in this state and fail to file a return or pay the tax due within 170 days from the time the return is due, this person shall pay a 25% penalty plus interest at the rate prescribed in § 59-11-16 and all other penalties and interest as provided by this title. If any part of the deficiency for which a determination of an additional amount is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of one hundred percent of such amount shall be added, plus interest at the rate of one percent per month or at the rate prescribed in § 59-11-16 if it is higher than 12% per annum from the time the return was due. The commission shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination by mail postpaid and the deficiency, plus penalties and interest, is due and payable ten days after notice and demand; except that when the commission finds a greater tax is due than was shown on the return, and the tax is not deemed to be in jeopardy, the additional tax, penalty and interest is due and payable within thirty days after the commission mails the report of deficiency determination. Upon making a record of its reasons, the commission shall have the power, in its discretion, to waive, reduce, or compromise any of the civil penalties or interest provided in this chapter.